TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

PETITION FOR CERTIORARI FILED JUNE 28, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,157)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No.

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1930

[fol. 1] [Caption omitted]

[fol. 2] IN SUPERIOR COURT OF NEW HAVEN COUNTY

E. F. FLYNN, Ex'r,

vs.

N. Y., N. H. & H. R. R. Co.

SUMMONS

To the sheriff of the county of New Haven, his deputy, or either constable of the town of New Haven, within said county, Greeting:

By authority of the State of Connecticut, you are hereby commanded to summon The New York, New Haven and Hartford Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, to appear before the Superior Court to be held at New Haven, in and for the county of New Haven, on the first Tuesday of June, 1929, then and there to answer unto Edward F. Flynn, of the town of West Haven, county of New Haven, State of Connecticut, as he is the executor of the estate of Edward L. Flynn, deceased, late of said town of West Haven, in a civil action wherein the plaintiff complains and says:

COMPLAINT

1. That on the fourth day of December, 1923, and for a number of years prior thereto, the defendant was a common carrier by railroad and as such common carrier was, on December 4, 1923, engaged in the business of transportation between the different States of the United States.

2. That on the fourth day of December, 1923, and for a number of years prior thereto, the defendant maintained at its Cedar Hill Yards located in the town and county of New Haven, State of Connecticut, a certain turn table, said turn table being used by the said defendant for the pur-

pose of switching locomotives engaged in interstate commerce, and while the plaintiff's testator, Edward L. Flynn, on said date was working upon the aforesaid turn table and was in the employ of the defendant, and while he and the defendant were then and there engaged in interstate commerce between the different States of the United States, he was caused to fall and sustained a reopening of an old fracture of the spine, and internal injuries to the stomach and abdomen which caused his death.

3. That said injuries and death were caused without any negligence on his part but solely by the negligence and [fol. 3] wrongful acts and omissions of the defendant's officers, agents and employees, and that the defendant failed to furnish proper safety appliances, and directed the plaintiff's testator to work upon said turn table while locomotives engaged in interstate commerce were run on and off said turn table, and that the defendant conducted its work by unsafe and dangerous methods, and failed to formulate and enforce proper rules and regulations for the safe conduct of the work, and while the plaintiff's testator was at work repairing and supervising the repairing of said turn table, and he, the said plaintiff's testator, being in the exercise of due care, a locomotive controlled and operated by the defendant was run upon said turn table in a negligent and careless manner; in that the officer, agent or employee of the defendant operating said locomotive struck said turn table with unusual force, and without sounding any warning of the approach of said locomotive, and further, that said officer, agent or employee of the defendant, ran said locomotive on to the said turn table when said turn table was not in the proper position to receive locomotives, and as a result, the plaintiff's testator was thrown with considerable force to the floor of said turn table, and sustained a reopening of an old fracture of the spine, and internal injuries to the stomach and abdomen which caused his death on September 1, 1928.

4. That said deceased left him surviving as his heirs and next of kin, his widow, Mary Flynn, five daughters, namely, Mary E. Flynn, aged twenty-six years; Nora T. Flynn, aged twenty-four; Catherine Flynn, aged twenty-one; Helen Flynn, aged nineteen and Gertrude Flynn, aged

eleven; and three sons, namely, the plaintiff, Edward F. Flynn, aged twenty-two; Joseph Flynn, aged sixteen, and Lawrence Flynn, aged thirteen, all of whom, at the time of the death of the deceased, in the manner aforesaid, and for a long time prior thereto, were dependent upon said deceased, and to whose support he contributed $160 per month. The said heirs and next of kin, dependents of the deceased, have, by reason of the deceased's death in the manner aforesaid, suffered a pecuniary loss.

[fol. 4] 5. That the plaintiff's testator left a last will and testament, and therein named the plaintiff executor of his estate, and that heretofore and before the date of this writ, the plaintiff was appointed executor of the estate of the said Edward L. Flynn by the Probate Court for the district of New Haven, said court having jurisdiction over the estate of the said Edward L. Flynn, and the said plaintiff has duly qualified and is now acting as such.

The plaintiff claims $30,000 damages.

Thomas R. FitzSimmons of New Haven is recognized in the sum of $70 to prosecute.

Of this writ with your doings thereon make due service and return.

Dated at New Haven this fifteenth day of May, A. D. 1929.

William F. Geenty, Commissioner of the Superior Court for New Haven County.

[Consent is hereby given to the filing of the within pleading and service of writ accepted. E. R. Brumley, attorney for New York, New Haven and Hartford Railroad Company.]

IN SUPERIOR COURT OF NEW HAVEN COUNTY

[Title omitted]

DEMURRER TO COMPLAINT—Filed June 10, 1929

Defendant demurs to plaintiff's complaint because it does not state facts sufficient to constitute a cause of action in that (1) as said complaint alleges that the injury

to the deceased occurred on the fourth day of December, 1923, and that his death occurred from said injuries on the first day of September, 1928, plaintiff's action is barred by the Act of April 22, 1908, chapter 149, section 6, and [fol. 5] other sections, as amended by the Act of April 5, 1910, chapter 143, section 1, and other sections, commonly known as the Federal Employers' Liability Act, which provides that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued;" (2) in that, in view of the aforesaid facts alleged in plaintiff's complaint, under said Act no cause of action for the death of the decedent could ever accrue to the plaintiff; (3) in that, in view of the aforesaid facts alleged in plaintiff's complaint, under said Act no right of action in the deceased survived to the plaintiff; (4) in that, in view of the aforesaid facts alleged in plaintiff's complaint, under said Act no right of action of deceased was revived in the plaintiff; (5) in that said complaint fails to allege that deceased underwent conscious suffering, such an averment being necessary under the Federal Employers' Liability Act.

The New York, New Haven and Hartford Railroad Company, Defendant, by E. R. Brumley, Its Attorney.

[Sustained July 11, 1929, by Ells, Judge. Memo. filed.]

In Superior Court of New Haven County

[Title omitted]

Memorandum of Decision on Demurrer—Filed July 11, 1929

Edward Flynn was injured December 4, 1923. It was his right to sue the railroad at any time within two years. He did not do so, and consequently at the time he died in 1928 he had no right of action. If he had died within the two years, then very clearly his family could sue at any time within two years from the date of his death. The [fol. 6] defendnant claims that the right of the family to

sue is dependent on the existence of a right of action in the injured person at the time of his death.

In the very recent case of Mellon v. Goodyear, 277 U. S. 335, it was held that if the injured person had settled or compromised his claim for his personal loss and suffering, obviously nothing passed to his administratrix because of such loss and suffering, and that when he had given a general and complete release even the right of action given to his family for pecuniary loss sustained by them through his death was lost.

The reasoning is that the foundation of the right of action is the original wrongful injury to the decedent, and that the new action (in behalf of the family) "is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." And again, "by the overwhelming weight of judicial authority where a statute of the nature of Lord Campbell's act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury." The court cites with approval a statement from Tiffany, "if the deceased in his lifetime has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representative for his death."

Taking these statements at their face value the conclusion necessarily follows, that if the injured person allowed his right to lapse, and if at the time he died he had no cause of action, then this second action by his dependents is also barred. The plaintiff claims, however, that because the Mellon case on its facts holds that a release based on satisfaction for the injury is a bar, it does not necessarily follow that the mere neglect of the injured man to bring suit resulting in the extinguishment of his right of action would likewise be a bar to an action by his dependents. Certainly the reasoning of the court goes the whole distance. It runs with the plaintiff's contention in so far as it reasons that the act declares two distinct and independent liabilities resting upon the common foundation [fol. 7] of a wrongful injury, but based upon altogether different principles; but diverges from the plaintiff's views

when it goes on to say "but as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

This is not an unjust result. The foundation of both causes of action is the wrongful injury. The injured person is given two years in which to assert his claim. If the injury is fatal his family can bring an action at any time within two years from the date of death for the wrong done to them by the injury resulting in death. It is fair that their claim, although different in nature and principle should be dependent on the existence of a right in the injured person at the time he died. If the injured person lived six months and then died both actions could prevail because it is a "single recovery for a double wrong." All this is fair and just, even liberal. But to go on and say that a man could be injured and make no claim and when he died forty years later allow his family to assert that his death resulted from the injury and that they should be compensated would do violence to the purposes of the statute of limitation.

To conclude. Edward Flynn was injured. Immediately there arose his right to sue within two years for the injury done to him. If he died as a result of the injury a new action came into existence; one for his family for the wrong done to them for causing his death. But the second action is founded on the original injury. If Edward Flynn had been compensated for his injury; if he had lost his right of action: if his cause of action for that injury no longer existed; their cause of action never came into existence. It arises only when there is a cause of action for the injury still in existence. With all liability to Mr. Flynn for his injury gone, however, it may have been extinguished, a liability does not arise as to his family.

The oral arguments and briefs proceed on the agreed statement of facts that no suit on behalf of Mr. Flynn had [fol. 8] been brought in his lifetime. This does not appear on the face of the pleadings. I have considered the de-

murrer as though this fact did appear, in order that the real question might be fully decided.

The demurrer is sustained.

Ells, Judge.

In Superior Court of New Haven County

Edward F. Flynn, of New Haven, Executor of the Estate of Edward L. Flynn,

vs.

The New York, New Haven and Hartford Railroad Company, a Connecticut Corporation Located in New Haven

Judgment—September 27, 1929

This action, by complaint claiming $30,000 damages came to this court on the first Tuesday of June, 1929, and thence to the present time when the parties appeared and were at issue on demurrer to the complaint as on file.

The court having heard the parties finds the issues for the defendant and that said complaint is insufficient.

The plaintiff having neglected and refused to plead further, it is thereupon adjudged that the defendant recover of the plaintiff its costs, taxed at — dollars and — cents.

By the court.

Alfred N. Wheeler, Clerk.

[fol. 9] In Superior Court of New Haven County

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed Oct. 3, 1929

In the above entitled cause the plaintiff (appellant) appeals from the judgment of said court to the Supreme Court of Errors, for a revision of the errors which he claims to have occurred in the trial thereof, and for reasons of said appeal assigns the following:

1. The court erred in rendering the judgment on file.

2. The court erred in sustaining the demurrer.

3. The court erred in sustaining the demurrer, in holding that the statute of limitations had run against the plaintiff's cause of action.

4. The court erred, in sustaining the demurrer, in holding that in order for the plaintiff to have a cause of action, it would be necessary for Edward L. Flynn, the deceased, to have died within two years from the date he was injured.

5. The court erred, in sustaining the demurrer, in holding that due to the failure of the deceased, in not having brought an action wthin two years from the date he was injured, the plaintiff was to be charged with his (deceased's) laches and laxity.

6. The court erred, in sustaining the demurrer, in holding that the neglect of the injured man to bring suit, resulted in the extinguishment of his right of action, and a bar to this action by his dependents.

7. The court erred, in sustaining the demurrer, in holding that no cause of action ever came into existence in favor of the plaintiff.

[fols. 10 & 11] He therefore prays for such relief as is provided by law in the premises.

Edward F. Flynn, Executor of the Estate of Edward L. Flynn, by William A. Bree, William F. Geenty, His Attorneys.

I certify that the foregoing appeal was filed on the third day of October, A. D. 1929, and William F. Geenty is recognized in the sum of $100, conditioned that the said Edward F. Flynn, executor of the estate of Edward L. Flynn, shall prosecute said appeal to effect and pay all costs therein if he should fail to do so; and said appeal is hereby allowed.

G. Herbert Bishop, Assistant Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] IN SUPREME COURT OF ERRORS OF CONNECTICUT

EDWARD F. FLYNN, Executor,

v.

NEW YORK, N. H. & H. R. Co.

Third Judicial District, Bridgeport, October Term, 1929

Wheeler, C. J.; Maltbie, Haines, Hinman, and Banks, Js.

Action to recover damages for injury alleged to have been caused by the negligence of the defendant, brought to the Superior Court in New Haven County and tried to the court, Ells, J., upon a demurrer to the complaint which the court sustained; plaintiff having neglected and refused to plead further judgment was rendered for the defendant and plaintiff appealed. No error.

William A. Bree and William F. Geenty for the appellant (plaintiff).

E. R. Brumley, with whom on the brief was Fleming James, Jr., for the appellee (defendant).

OPINION

[fol. 13] WHEELER, C. J.:

The complainant alleges that the defendant was on December 4, 1923, a common carrier engaged in the business of transportation between states of the United States, that on this day its employee, Edward L. Flynn was injured through defendant's negligence, to which he did not contribute, and in consequence died on September 1, 1928, leaving surviving him his widow and five daughters and that the plaintiff is the duly qualified executor under the will of the decedent.

The defendant demurred to the complaint which was dated May 15, 1929, upon the principal ground, stated in several forms, that the injury to the decedent having occurred on December 4, 1923, and death having occurred on September 1, 1928, the plaintiff's action which was brought to recover for pecuniary loss to the widow and children of the decedent under the Federal Employers' Liability Act

of April 22, 1908, Chapter 149, Section 6 as amended by the Act of April 5, 1910, Chapter 143, is barred, since by it no cause of action ever accrued to the plaintiff. The reasons of appeal pursued by the appellant involve the single question raised by the demurrer which we have stated.

The Act of 1908 which we set out in the footnote,* creates [fol. 14] "two distinct and independent" causes of action against the carrier, one to the injured employee for the wrongful injury to him, the other in behalf of designated relatives for the pecuniary loss resulting to them by reason of the wrongful death. The latter action includes no damages which the decedent might have recovered had he survived but only the pecuniary damages to the relatives caused by his death which "can be measured by some standard."

Each action rests upon "the common foundation of a wrongful injury" but each is governed by "altogether different principles." These have been so definitely determined by the Supreme Court of the United States that a reference to some of these decisions is all that is now required. Mich. Cent. R. R. v. Vreeland, 227 59, 68, 70; 33 Sup. Ct. Rep. 192; Mellon v. Goodyear, 277 U. S. 335. We had a similar action under this Act before us in Farley v. New York, N. H. & H. R. Co., 87 Conn. 328, 335, 87 Atl.

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* "Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe', to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe'; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or

990. It was decided in July, 1913 while Mr. Justice Lurton's opinion in Mich. Cent. R. R. Co. v. Vreeland, supra, upon which we relied, was handed down in December, 1912.

Our opinion construes this act as applied to the second of these causes of action in this manner; "The statute under which the action was brought, in so far as it provides for recovery for death, follows the lines of Camp- [fol. 15] bell's Act in England, and in its distinguishing features is identical with that Act, Mich. Cent. R. Co. v. Vreeland, supra. It creates a right of action where there was none at common Law, and one which is entirely independent of any which the deceased may have had in life and which comes originally to the personal representative by the operation of the statute, and not by the process of survival. It is one for the exclusive benefit of certain specified persons, and the damages recoverable are such as result to them by reason of their having been deprived through the wrongful death of the deceased of a reasonable expectation of pecuniary benefits attendant upon his continuance in life." The action in behalf of the beneficiaries cannot be maintained unless the decedent immediately before his death could have maintained his action for injuries suffered by the negligence of the defendant, since the foundation of this action is the existence of this

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insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

injury. The authorities generally, as well as in this jurisdiction, so hold. Mich. Cent. R. R. Co. v. Vreeland, supra, at page 70; Mellon v. Goodyear, 277 U. S. 335, 341, and cases cited in each opinion; Kling v. Torrello, 87 Conn. 301.

It follows from this that a settlement of the claim of the injured person for his wrongful injury in the absence of fraud or mistake will bar an action in behalf of his relatives under this statute for his death. The Supreme Court reiterated its previously expressed view upon this point in these words: "By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud [fol. 16] or mistake, precludes any remedy by the personal representative based upon the same wrongful act. * * * The cases supporting this view, from courts of last resort in twenty-one States, Canada and England are collected in a note following the first opinion of the Supreme Court of Kansas in the present cause, reported in 39a L. R. 579." Mellon v. Goodyear, 277 U. S. 335, at page 344. The same rule, under this act, is applicable in case the decedent in his lifetime has recovered judgment for his injury and received satisfaction thereof. Seaboard Air Line Ry. Co. v. Oliver, 261 Fed. R. 1.

"Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured." Mich. Cent. R. Co. v. Vreeland, 227 U. S. at page 67. It was also held in this case that the Act of 1908 did not provide for a survival of a right of action but that this was extinguished by death. The Act was amended April 5, 1910, 36 Stat. 291 C. 143 by adding to it section 9. "That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

No change was made by the amendment in section 1 of the 1908 Act which we quote in the footnote. The amendment was construed in St. Louis v. Iron Mountain Ry. Co. v. Craft, 237 U. S. 648, 657, 658. It is there said: "It continues, as before, to provide for two distinct rights of action; * * * Without abrogating or entailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his [fol. 17] personal representative 'for the benefit of' the same relatives in whose behalf the other right is given."

Section 1 of Chap. 143 of the amending Act of 1910, 36 Stat. 291, in part provides: "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." Each of the actions authorized by this chapter was thereafter barred unless brought within two years from "the day the cause of action accrued." The plaintiff unless barred by this statute could have brought in behalf of the designated relatives his action for the injury to the decedent, and that the pecuniary loss suffered by his death, for the decedent would have had his right of action for his own injuries immediately prior to his death. In Rodgers v. Pennsylvania R. Co. 19 Fed. (2nd series) 522, the decedent was injured November 10, 1922, while in defendant's employ. On February 4, 1925, more than two years after the accident the decedent died without any action having been instituted upon his behalf. On December 2, 1926, an action was brought by the administratrix of the deceased under this Act to recover for the injuries to the decedent and for the pecuniary loss to the relatives by reason of the death of the decedent. It was held that the right of action of the representative was barred where the decedent lived more than two years after his injury and brought no action for his own injury in his lifetime.

The Act of 1910 in terms covers both of the actions authorized under section 1 of the Act of 1908, and since the decedent did not bring his action for his own injury within two years from the occurrence of the accident the right of his representative to bring his action is barred. This conclusion, we recognize, conflicts with a statement found in the opinion in Seaboard Air Line Ry. Co. v. Oliver, (C. C. [fol. 18] A.) 261 Fed. 1 at page 2.

The new right of action given the representative of the designated relatives to recover for the pecuniary loss to them through the death of the decedent is, as we have stated, "dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." Mich. Cent. R. Co. v. Vreeland, 227 U. S. at page 70. This is the rule under Lord Campbell's Act; the Federal Employers' Act is essentially identical with that. The cause of action for death arises upon the occurrence of the death but if the decedent's right of action for his wrongful injury has ceased to exist it would be as defendant insists anomalous to hold that the right of action for the wrong to the beneficiaries arising out of the wrongful injury to the decedent is enforceable. We discover no distinction between a judgment, or a settlement obtained by the decedent, and the lapse of the statutory period, in barring the maintenance of an action under this Act.

There is no error.

In this opinion the other judges concurred.

(The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports. Richard H. Phillips, Reporter.)

[fol. 19] In Supreme Court of Errors of Connecticut

Edward F. Flynn, of New Haven, Executor of the Estate of Edward L. Flynn,

vs.

The New York, New Haven & Hartford Railroad Company, a Connecticut Corporation Located in New Haven

On Appeal from the Superior Court New Haven County

Judgment—Mar. 31, 1930

This appeal by the plaintiff claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may

appear in the certified transcript of record and finding of facts, on file in this Court, was allowed by the Superior Court for New Haven County on the third day of October, A. D. 1929, and came to this Court, at its term held at Bridgeport on the fourth Tuesday in October, A. D. 1929, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the appellee recover of the appellant its costs taxed at $—.

Date of Judgment, March 31, 1930.

By the Court.

Alfred N. Wheeler, Clerk.

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Supreme Court of Errors of the State of Connecticut is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 28 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT AND BRIEF IN SUPPORT THEREOF.

THOMAS R. FITZSIMMONS,
Counsel for Petitioner.
WILLIAM A. BREE,
WILLIAM F. GEENTY,
Of Counsel.

(35,157)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Edward F. Flynn, as executor of the estate of Edward L. Flynn, deceased, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

On December 4, 1923, Edward L. Flynn, since deceased, was employed by The New York, New Haven and Hartford Railroad Company as a foreman of car-

penters at their Cedar Hill Yards, located in the town and county of New Haven and State of Connecticut (R. 1-2).

On that date Edward L. Flynn and The New York, New Haven and Hartford Railroad Company were engaged in interstate commerce, and while they were so engaged Edward L. Flynn, due to the negligence of other employees of The New York, New Haven and Hartford Railroad Company was seriously injured, and as a result of his injuries, after having lingered for a long period of time, died on September 1, 1928 (R. 1-2).

Edward L. Flynn at the time of his death left him surviving a widow and eight children, who were dependent upon him; and as a result of his death they suffered pecuniary loss (R. 2-3).

Edward F. Flynn, the petitioner, a son of Edward L. Flynn, deceased, was thereafter duly appointed executor of the estate of Edward L. Flynn, deceased, by the Probate Court for the district of New Haven, said court having jurisdiction over the estate of Edward L. Flynn, and the petitioner has duly qualified and is acting as such (R. 3).

Edward L. Flynn during his lifetime brought no cause of action for his injuries which were due to the negligence of the servants and employees of The New York, New Haven and Hartford Railroad Company; nor was his right of action for said injuries adjudicated, compromised, or released in any manner.

By writ, complaint, and summons, dated May 15, 1929—that is, within nine months from the death of

Edward L. Flynn—the petitioner brought an action in the Superior Court for New Haven County, within the State of Connecticut, returnable on the first Tuesday of June, 1929, for the pecuniary loss sustained by the widow and children of the deceased, and said writ, complaint, and summons was, on that date, duly served upon the respondent. This action was brought under the Federal Employers' Liability Act, which is the act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65 (R. 3).

The facts are not in dispute. The manner in which the questions involved were raised in this case was by a demurrer of the respondent to the writ, complaint, and summons of the petitioner (R. 3-4). The case was heard by the Superior Court for the County of New Haven without evidence and upon undisputed facts. A memorandum of decision on demurrer was filed on July 11, 1929, by the Honorable Arthur F. Ells, Judge of the Superior Court, sustaining the demurrer of the respondent. The petitioner refused to plead further and on September 27, 1929, judgment was rendered without opinion in favor of the respondent by Honorable Christopher L. Avery, Judge of the Superior Court (R. 7), from which judgment an appeal was taken to the Supreme Court of Errors. From its judgment the within petition for a writ of certiorari is pursued. There is now respectfully submitted to this Court a number of questions of law.

B.

Reasons Relied on for the Allowance of the Writ.

The special and important reasons for the granting of a review of the within writ of certiorari are:

I. That the Supreme Court of Errors of the State of Connecticut has decided a Federal question of substance not heretofore determined by this Court, but should be settled by this Court on a hearing on the merits (Rule 38, Sec. 5 (*a*)).

II. That the Supreme Court of Errors of the State of Connecticut has decided an important Federal question of substance in a way which is not in accord with applicable decisions of this Court (Rule 38, Sec. 5 (*a*)).

(A) Reasons Nos. I and II present the following important claims:

That the statute of limitations begins to run against an action by the dependents of a deceased employee for the pecuniary loss sustained by them due to the death of said employee from the time of death.

Reading Co. *vs.* Koons, 271 U. S. 58.
Chicago, Burlington & Quincy R. R. *vs.* Wells-Dickey Trust Co., 275 U. S. 161.

(B) Reasons Nos. I and II present the following important claims:

That the Federal Employers' Liability Act does not, in express terms, make the personal

representative's right to maintain an action dependent upon the existence of a right of action in the decendent immediately before he dies, and that the gist of the Federal Employers' Liability Act is that in all cases there shall be but one recovery for the wrongful acts and that the dependents' right of action shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts.

Seaboard Airline Ry. *vs.* Oliver, 261 Fed. 1.

Mellon *vs.* Goodyear, 277 U. S. 335.

(C) REASONS NOS. I AND II PRESENT THE FOLLOWING IMPORTANT CLAIMS:

That the Federal Employers' Liability Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury and based upon altogether different principles.

Michigan Central R. R. Co. *vs.* Vreeland, 227 U. S. 59.

St. Louis & Iron Mountain R. R. *vs.* Craft, 237 U. S. 648.

American Railroad *vs.* Didrichson, 227 U. S. 145, 149.

Taylor *vs.* Taylor, 232 U. S. 363,370.

(D) REASONS NOS. I AND II PRESENT THE FOLLOWING IMPORTANT CLAIMS:

That this Court has never had before it the point of law involved in this case arising under the Federal Employers' Liability Act and, therefore, this Court should take jurisdiction so that the point may be finally determined.

The foregoing questions and claims set out under Reasons I and II, the petitioner respectfully represents, were erroneously determined by the courts below, and your petitioner has no other relief or adequate remedy than that of securing a writ of certiorari from this Court. Without that relief, the petitioner is without redress.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Errors of the State of Connecticut and commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 30607, Edward F. Flynn, executor of the estate of Edward L. Flynn, appellant, *vs.* The New York, New Haven and Hartford Railroad Company, appellee, and that said judgment of the Supreme Court of Errors of the State of Connecticut may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in

the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED.

By THOMAS R. FITZSIMMONS,
Counsel for Petitioner.

WILLIAM A. BREE,
WILLIAM F. GEENTY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the Supreme Court of Errors for the State of Connecticut is reported in Edward F. Flynn, as executor of the estate of Edward L. Flynn, deceased, vs. The New York, New Haven and Hartford Railroad Company, 149 Atlantic Reporter 682; Ad-

vance Sheet No. 7, May 3, 1930; 111 Connecticut Reports, Advance Sheet No. 3, May, 1930.

The opinion is printed on pages 9 to 14 of the record.

II.

Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction of this Court, as required by Rule 12, par. 1, and Rule 27, par. 2, "*c*", is as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding

paragraph nor shall the fact that a review on writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Judicial Code, Section 237 (*b*), as amended by the Act of February 13, 1925; 43 Stat. 937.

2. The date of judgment to be reviewed is March 31, 1930 (R. 14).

3. The nature of the case: a suit under the Federal Employers' Liability Act against an interstate carrier (R. 1-3).

Federal Employers' Liability Act, Act of April 22, 1908, c. 149, Sec. 1; 35 Stat. 65.

and the nature of the rulings below (R. 9-14) (Petition, pages 4, 5) (Rule 38, Sec. 5 (*a*)) were such as to bring the case within the jurisdictional provision relied on, as required by Rule 12, par. 1, Rule 27, par. 2 (*c*).

4. Cases believed to sustain the jurisdiction of this Court, as required by Rule 27, par. 2 (*c*), are:

Chicago, Rock Island & Pacific Ry. Co. *vs.* Devine, 239 U. S. 52.

Talbot *vs.* Sioux City First National Bank, 185 U. S. 172.

III.

Statement of the Case.

A full statement of the case has been given under heading "A" in the petition for writ of certiorari

and, in the interest of brevity, it is deemed wise not to repeat it at this point.

IV.

Specifications of Errors.

1. The Supreme Court of Errors of the State of Connecticut erred in not holding that the statute of limitations, under the Federal Employers' Liability Act, begins to run against the action by the dependents of a deceased employee, for the pecuniary loss sustained by them due to the employee's death, from the time of the death, and that no cause of action vests in such dependents until the death.

2. The Supreme Court of Errors of the State of Connecticut erred in not holding that there is a distinction where an injured employee, during his lifetime, extinguishes his right of action by settlement, compromise, or adjudication, thereby extinguishing the right of action in his dependents, as the one recovery, as limited by the Act, has been had; and where the decedent, due to laxity or lapse of time, fails to bring his cause of action within two years of the date of the injury and dies without ever having received any compensation as provided for under the Federal Employers' Liability Act.

3. The Supreme Court of Errors of the State of Connecticut erred in not holding that the Federal Employers' Liability Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury, but based upon altogether

different principles, and that cause of action, created for the benefit of the dependents of a deceased employee, is one beyond that which the decedent had.

4. That the Supreme Court of Errors of the State of Connecticut erred in sustaining the respondent's demurrer to the petitioner's complaint.

V.

ARGUMENT.

Summary of the Argument.

Point A. The statute of limitations begins to run against an action by the dependents of a deceased employee, under the Federal Employers' Liability Act, for the pecuniary loss sustained by them due to the death of said employee, from the time of his death.

Point B. The Federal Employers Liability Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies, and that the gist of the Federal Employers' Liability Act is that in all cases there shall be but one recovery for the wrongful acts, and that the dependents' right of action shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts.

Point C. The Federal Employers' Liability Act declares two distinct and independent liabilities resting

upon the common foundation of a wrongful injury and based upon altogether different principles.

Point D. This Court has never had before it the point of law involved in this case arising under the Federal Employers' Liability Act and, therefore, this Court should take jurisdiction so that the point may be finally determined.

Point E. That the Supreme Court of Errors of the State of Connecticut erred in sustaining the respondent's demurrer to the petitioner's complaint.

POINT A.

The statute of limitations begins to run against an action by the dependents of a deceased employee, under the Federal Employers' Liability Act, for the pecuniary loss sustained by them due to the death of said employee, from the time of his death.

It is conceded and an undisputed fact that Edward L. Flynn was injured on December 4, 1923, and that he died on September 1, 1928, and within nine months from the date of his death this action was brought by the petitioner. The Federal Employers' Liability Act provides that "no cause of action shall be maintained under this chapter unless commenced within two (2) years from the day the cause of action accrued."

Act of April 22, 1903, c. 149, Sec. 6, 35. Stat. 65, as amended by the Act of April 5, 1910, c. 143, Sec. 1, 36; — Stat. 291.

There can be no question about it but that the dependents of the deceased employee, Edward L. Flynn,

had no cause of action nor any standing in court, nor did any cause of action become vested in them until September 1, 1928, *i. e.*, the date of Edward L. Flynn's death. There was no way in which these dependents, through the petitioner, could start their cause of action given them under the provisions of the Federal Employers' Liability Act until the employee had died. As a matter of fact, they had no cause of action until the event, the death of Edward L. Flynn, occurred. When the event which gave them their cause of action, *i. e.*, the death of Edward L. Flynn, occurred, the petitioner commenced this action in good season.

This Court has held that "every practical consideration which would lead to the imposition of any period of limitation would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator."

Reading Company *vs.* Koons, admr., 271 U. S. 58.

And this Court in a later case held that "the cause of action accrues after death. When it accrues, there is an immediate, final, and absolute vesting; and the vesting is in that one of several possible beneficiaries who, according to the express provisions in the statute, is declared entitled to be compensated."

Chicago, Burlington & Quincy R. R. *vs.* Wells-Dickey Trust Co., 275 U. S. 161.

This is the only reasonable and sensible rule which can be applied in these cases arising under the Federal

Employers' Liability Act. The cause of action given to the dependents of employee is for the pecuniary loss sustained by reason of the employee's death. The cause of action does not arise until the employee dies, and surely the time within which the action must be brought cannot begin to be computed until the cause of action arises.

POINT B.

The Federal Employers' Liability Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies, and that the gist of the Federal Employers' Liability Act is that in all cases there shall be but one recovery for the wrongful acts, and that the dependents' right of action shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts.

It is admitted that Edward L. Flynn, the deceased employee in this case, did not settle or release his claim for damages for the injuries he received on December 4, 1923, nor did he bring suit, nor was any adjudication or satisfaction had by him at any time during his lifetime. We therefore have in this case an admitted wrongful and negligent act for which no recovery has been had by the employee or his dependents under the Federal Employers' Liability Act.

It has been decided by this Court that where an employee has been injured, and during his lifetime has

either released or settled his cause of action with the carrier, or his right of action has been adjudicated or satisfied, the cause of action of the dependents of such an employee is barred. And this is reasonable and clear as the one recovery as provided for by the Act has been had, and the entire field of law on this particular subject is very thoroughly gone into in this same case.

Mellon *vs.* Goodyear, 277 U. S. 335.

But there is a distinction in the case at bar and the case of Mellon *vs.* Goodyear, *supra.* In the case at bar, there never has been a release, settlement, adjustment or adjudication of the cause of action which has vested in the decedent, Edward L. Flynn, and no recovery has been had by him during his lifetime, nor has any recovery been had by his dependents. True at the time of Edward L. Flynn's death he had no cause of action, but this was not due to an affirmative extinguishment of his right, but due to lapse of time, or a passive extinguishment, which was an extinguishment of his right of action alone. The right of action of the dependents was in no way affected by the extinguishment of his right, as it was not existent until the death of Edward L. Flynn. There is a great distinction where the cause of action of the employee is affirmatively extinguished and where it is extinguished by mere lapse of time as affecting the dependents' cause of action. This distinction is pointed out in a case decided by the Circuit Court of Appeals for the Fifth Circuit, and that part of its opinion was cited by this

Court in Mellon *vs.* Goodyear, *supra.* The Circuit Court of Appeals said:

> "The Federal Employers' Liability differs from Lord Campbell's Act and other similar statutes in that the former does not, in terms, make the personal representatives' right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies."
>
> "The defendant in error's lack of right to maintain his suit in such a situation as the one under consideration is due, not to the decedent's lack, immediately prior to his death, of an enforceable right of action for the injury he sustained, but to the fact that the cause of action counted on has been extinguished by payment of the judgment recovered by the decedent for the wrong he suffered."
>
> Seaboard Air Line Ry. Co. *vs.* Oliver, 261 Fed. 1.

POINT C.

The Federal Employers' Liability Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury, and based upon altogether different principles.

This Court has repeatedly held, in a number of cases, that the Federal Employers' Liability Act declares two distinct and independent liabilities founded on the common wrongful injury, but based upon altogether different principles. The cause of action created for the benefit of the dependents of an em-

ployee who dies as a result of his injuries is not a representative right, but a separate and distinct right which is vested in certain designated dependents. The cause of action in the dependents is independent of any cause of action which the deceased employee had, and it includes no damages which the employee might have recovered in an action brought by him during his lifetime. It is a liability for the loss and damage sustained by the relatives dependent upon the decedent. As this Court said:

> "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death."
>
> Michigan Central Railroad Co. *vs.* Vreeland, 227 U. S. 59.

To show more conclusively that the Act declares two distinct and independent causes of action, this Court, in a case which was decided after Michigan Central Railroad Company *vs.* Vreeland, *supra,* in construing the Act as amended by the Act of April 5, 1910, 36 Stat. 291, c. 143, went further. In that case, the administrator claimed damages on account of the pecuniary loss to the father; and also damages for the conscious pain and suffering by the decedent. This Court permitted a recovery on both claims and said:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and

is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

St. Louis & Iron Mountain Ry. Co. *vs.* Craft, 237 U. S. 648.

And this rule is again laid in another case decided by this Court, in which the entire filed of the law on this subject is very thoroughly considered.

Mellon *vs.* Goodyear, 277 U. S. 335.

A case which was before the House of Lords in England in which a statute similar to the Federal Employers' Liability Act, and in which the exact question that is presented by this case at bar was decided, might be of help. In that case the House of Lords held:

"The Code ignores the representatives of the injured person, and gives a direct right of action to his widow and relations." "These parties are to have an indpendent and not a representative right." * * *

"The prescription established by Sec. 2262 (2) had cut off the deceased's right of action * * * * but the Code does not make it a condition of the right of action given to the appellant by Sec. 1056 that her husband's claim shall not have prescribed. That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by reference to Sec. 1138, which enum-

erated the various ways in which an obligation may be extinguished.

Law Reports—Appeal Cases (1892), page 481 (English).

POINT D.

This Court has never had before it the point of law involved in this case arising under the Federal Employers' Liability Act and therefore this Court should take jurisdiction so that the point may be finally determined.

This Court has never had before it for decision the point of law in question in this case, *i. e.*, where an employee dies more than two years after he has been injured without having released, settled, or compromised his claim, or having his claim adjudicated in the courts during his lifetime; whether or not the statute of limitations has run against the action of the dependents, or whether or not the action of the dependents is barred by reason of the statute of limitations having run against the decedent's cause of action before his death.

POINT E.

That the Supreme Court of Errors of the State of Connecticut erred in sustaining the respondent's demurrer to the petitioner's complaint.

The reasons why the Supreme Court of Errors should not have sustained the respondent's demurrer to the petitioner's writ, summons, and complaint have been necessarily included in Points A, B, and C of this

argument, and therefore, in the interest of brevity, it will not be treated here.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its Supervisory powers, in order that the errors of the Supreme Court of Errors for the State of Connecticut be corrected and reversed, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Errors for the State of Connecticut and finally reverse it.

THOMAS R. FITZSIMMONS,
Counsel for Petitioner.

WILLIAM A. BREE,
WILLIAM F. GEENTY,
Of Counsel.

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Supreme Court of the United States

October Term, 1930

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWARD R. BRUMLEY,
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FLEMING JAMES, JR.,
Of Counsel.

Quinnipiac Press, New Haven, Conn.

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No. 235

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The Memorandum of Decision on Demurrer, of Judge Ells of the Superior Court of New Haven County, is to be found at pages 4 to 7 of the Record.

The Supreme Court of Errors of Connecticut found no error, Chief Justice Wheeler writing the opinion. 111 Conn. 196, (R., 9-14).

Jurisdiction of This Court

(a) The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code, as amended, Subdivision (b) (43 Stat. 937).

(b) The judgment sought to be reviewed is dated March 31, 1930 (R., 14, 15). The present petition was filed in this Court on the 28th day of June, 1930.

(c) This case was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65), to recover damages for pecuniary loss by reason of the death of petitioner's decedent (R., 1-3).

Defendant's demurrer to the complaint was sustained and the complaint adjudged insufficient (R., 7). This judgment in the Superior Court of New Haven County was confirmed and established by the Supreme Court of Errors of Connecticut (R., 14, 15).

"The defendant demurred to the complaint which was dated May 15, 1929, upon the principal ground, stated in several forms, that the injury to the decedent having occurred on December 4, 1923, and the death having occurred on September 1, 1928, the plaintiff's action which was brought to recover for pecuniary loss to the widow and children of the decedent under the Federal Employers' Liability Act of April 22, 1908, Chapter 149, Section 6 as amended by the Act of April 5, 1910, Chapter 143, is barred, since by it no cause of action ever accrued to the plaintiff." (R., 3, 4, 9, 10).

(d) Cases believed to sustain the jurisdiction of this Court are:

Mellon v. *Goodyear*, 277 U. S. 335
Reading Co. v. *Koons*, 271 U. S. 58

Statement of the Case

This action was brought under the Federal Employers' Liability Act (*supra*), for pecuniary loss to the widow and children of the deceased (R., 1-3).

The accident occurred December 4, 1923, the death September 1, 1928, and the complaint is dated May 15, 1929 (R., 1-3).

Question Presented

Whether under the Federal Employers' Liability Act, in an action for a wrongful death occurring more than two years after the accident from which it is alleged to have resulted, any right of action ever accrued to the plaintiff, the decedent's executor, where the decedent had never brought suit on such accident; whether the termination of the decedent's cause of action by the lapse of more than two years between the date of the accident and the date of death, prevented any action for his death from arising in favor of his dependents.

Argument

The petition for writ of certiorari should be granted:

(1) The Supreme Court of Errors of the State of Connecticut has decided an important question of Federal law which has not been, but should be, settled by this Court.

(2) There is the need of a final decision in respect of the question presented.

(3) To obtain this final decision is obviously important to injured employees, to dependents of employees fatally injured, and to railroads.

While the respondent considers its position, and the decisions of the two state courts, correct, it joins in the petition for a writ of certiorari for the reasons given.

It is to be noted that the complaint makes no claim for damage on account of injury of the deceased employee so that we need not here concern ourselves with section 2 of the Act of April 5, 1910, c. 143, 36 Stat. 291.

The Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, reads as follows:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Act of April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by the Act of April 5, 1910, c. 143, § 1, 36 Stat. 291, reads in part as follows:

"No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

The only Federal case with similar facts is *Rodgers v. Pennsylvania R. Co.*, 19 Fed. (2) 522 (District Court, E. D. New

York, 1927), where the accident occurred November 10, 1922, the death February 4, 1925, and the action was brought December 2, 1926. The motion to dismiss the complaint was granted because no right of action existed in the deceased immediately preceding his death. There is language in *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 70 which supports our contention but the question was not involved. Nor did the precise point arise in *Chicago, Burlington & Quincy R. R.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161.

In *Reading Co.* v. *Koons, supra*, the date of the accident was April 22, 1915, the death April 23, 1915, and the action was begun February 6, 1922, five months after administration had been taken out. This Court held that the date of the death was the date of accrual.

In *Mellon* v. *Goodyear, supra*, the accident was July 31, 1919, the settlement March 16, 1920, the death May 4, 1920, the suit April 19, 1921. This Court held that the settlement relieved the Director General from all liability.

Williams v. *Mersey Docks & Harbour Board*, [1905] 1 K. B. 804 is authority for our position. In this country, in the state courts, we find *Kelliher* v. *N. Y. C. & H. R. R. Co.*, 212 N. Y. 207; *Williams* v. *Alabama Great Southern Ry. Co.*, 158 Ala. 396.

There is attached to the right of action by the personal representative the implied statutory condition that, at the time of the employee's death, he had a right of action that could be enforced. To hold otherwise would be to read into the statute an intent to create a liability to the dependents when there was none to the deceased at the time of death.

In respect of this problem it is difficult to see any legal distinction between a judgment, a settlement, and a lapse of the statutory period.

Conclusion

We respectfully submit that the present petition should be granted.

EDWARD R. BRUMLEY,
Counsel for The New York, New Haven and Hartford Railroad Company.

FLEMING JAMES, JR.,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1930

No. 235

EDWARD F. FLYNN, EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT

EDWARD R. BRUMLEY,
Counsel for Respondent.

FLEMING JAMES, JR.,
Of Counsel.

QUINNIPIACK PRESS, INC., NEW HAVEN, CONN.

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Supreme Court of the United States

OCTOBER TERM, 1930

EDWARD F. FLYNN, as Executor of the Estate of EDWARD L. FLYNN, Deceased, *Petitioner*,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

No. 235

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Opinions of the Courts Below

The Memorandum of Decision on Demurrer of Judge Ells of the Superior Court of New Haven County, State of Connecticut, is to be found at pages 4 to 7 of the Record.

The Supreme Court of Errors of Connecticut found no error. 111 Conn. 196 (R. 9-14).

Jurisdiction of this Court

This Court granted petitioner's application for writ of certiorari on October 14, 1930.

Statement of the Case

Petitioner brought this action under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, §1, 35 Stat. 65) to recover damages for pecuniary loss by reason of the death of petitioner's testator (R. 1-3).

The complaint alleges that on December 4th, 1923, Edward L. Flynn was in the employ of defendant at its Cedar Hill Yards, New Haven, Connecticut; that while he and the defendant were engaged in interstate commerce he sustained injuries from which he died on September 1st, 1928 (R. 1, 2). The writ is dated May 15th, 1929 (R. 3).

Defendant demurred to the complaint on several grounds among them being:

(1) that plaintiff's action is barred by the two year provision in the Federal Employers' Liability Act (See p. 4);

(2) that in view of the facts no cause of action for the death of the decedent could ever accrue to the plaintiff (R. 3, 4).

The Superior Court sustained the demurrer finding the complaint insufficient on the ground that no cause of action accrued to plaintiff because none existed for the injury at the time of the death (R. 5-7).

The Supreme Court of Errors confirmed this judgment (R. 14, 15). Chief Justice Wheeler wrote the opinion, the other judges concurring (R. 9-14).

Question Presented

Whether under the Federal Employers' Liability Act of 1908, in an action for a wrongful death occurring more than two years after the accident, any right of action ever accrued to decedent's executor, where the decedent had never brought suit on such accident.

Summary of Argument

Point I—Under the Federal Employers' Liability Act no right of action for wrongful death, occurring more than two years after the accident causing the death, where the decedent had never brought suit on such accident, accrues to the personal representative of his estate.

(a) Pertinent provisions of the Federal Employers' Liability Act.

(b) The nature of the statutory liability in damages to the personal representative provided for by the Act of April 22, 1908, c. 149, §1, 35 Stat. 65, indicates no liability exists unless there is liability to the employee at the time of his death.

(c) The same conclusion has been reached under similar statutes.

Point II—The interpretation adopted is fair to all parties.

POINT I

Under the Federal Employers' Liability Act no right of action for wrongful death, occurring more than two years after the accident causing the death, where the decedent had never brought suit on such accident, accrues to the personal representative of his estate.

(a) *Pertinent provisions of the Federal Employers' Liability Act.*

The Act of April 22, 1908, c. 149, §1, 35 Stat. 65, reads as follows:

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, *shall be liable* in damages *to any person suffering injury* while he is employed by such carrier in such commerce, *or, in case of the death of such employee, to his or her personal representative*, for the benefit of the surviving

widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (italics ours).

The Act of April 22, 1908, c. 149, §6, 35 Stat. 66, read in part as follows:

"That no action shall be maintained under this Act unless commenced within two years from the date the cause of action accrued."

This was amended by Act of April 5, 1910, c. 143, §1, 36 Stat. 291, to read as follows:

"No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

The provision for survival of the right of action of the person injured (Act of April 5, 1910, c. 143, §2, 36 Stat. 291) is not involved as the complaint makes no claim for damages on account of injury of the deceased employee.

(b) *The nature of the statutory liability in damages to the personal representative provided for by the Act of April 22, 1908, c. 149, §1, 35 Stat. 65, indicates no liability exists unless there is liability to the employee at the time of his death.*

The foundation of the right of action given to the personal representative "is the original wrongful injury to the decedent." It is true that the measure of damages is for the pecuniary loss

to the relatives dependent, and the measure does not include his damages. *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 68, 70. But both rights of action have the common ground of the original wrongful injury of the person. Mr. Justice Lurton said:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." (p. 70).

The liability to the personal representative and the liability to the injured employee go back to the same "group of facts", to use an expression adopted by Mr. Justice Sutherland in *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, at page 321. If there has been an unlawful violation of the right of bodily safety the injured employee has a right of action for loss and suffering. If there has been an unlawful invasion of a right not to be damaged pecuniarily the personal representative has a right of action for pecuniary loss of certain beneficiaries. The origin of both is the same wrongful act or neglect, and the consequent injury to the decedent. It is true that the two claims are distinct and one begins where the other ends. Recovery upon both claims is a single recovery for a single wrongful act, single tort. *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 494, 495, and cases cited. The common origin principle is recognized by Judge Ells in his memorandum decision, and he applies the reasoning of this Court in *Mellon* v. *Goodyear*, 277 U. S. 335, and takes its statements at their face value (R. 5, 6).

Beside a common origin we find a continued close relationship between the two causes and two resulting rights of action. In *Mellon* v. *Goodyear*, *supra*, a settlement was made with the injured employee who accepted the agreed sum. There-

after he died, and his dependents brought suit for their pecuniary damages through his death. It was held that a release by the injured employee was a defense to any action for his death. While the decision may be placed on the narrow ground of only one recovery within contemplation of the statute, this Court used this broad language:

> "By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury." (p. 344).

Certain parts of the opinion of Circuit Judge Walker in *Seaboard Air Line Ry. Co.* v. *Oliver*, 261 Fed. 1 (Circ. Ct. of Appeals, 5th. Circ.) have interest for us. In that case Hall had recovered a judgment and satisfaction by payment for injuries which later resulted in his death. His personal representative brought an action under the Federal Employers' Liability Act of 1908. The opinion concludes that under the statute the two rights of action are given disjunctively, that when the injured employee has died without having enforced his right of action only one recovery is allowed, and so, by inference, the opinion says, when the injured employee has enforced his right of action the personal representative has no right of action to enforce. Not only are the two rights based upon a single tort, but their continued existence "is dependent upon conduct of the employee at the time of, or subsequent to, the injury." (p. 3).

Not only a release by the injured employee and satisfaction, not only a satisfied judgment, but an agreement of non-liability by the injured person prior to the accident may bar an action for his death. *Northern Pacific Railway Co.* v. *Adams*, 192 U. S. 440. While mere existence of a right of action in the employee does not bar the right of action for death (*Mich.*

Cent. R. R. v. *Vreeland, supra*) the latter right depends upon the continued existence of the former right. If it ceases to exist through any cause the representative's right of action does not come into existence. A fortiori if no cause of action ever existed in the employee none can accrue to the personal representative. *Frese, Admx.* v. *Chicago, Burlington & Quincy R. R. Co.*, 263 U. S. 1. What an unusual situation would obtain if the employer ceased to be liable to the employee by lapse of time, and after an indefinite period, during which no cause of action existed anywhere, a new cause of action sprang into being solely because of the employee's death.

Unquestionably the limitation of time in the Federal Employers' Liability Act operates as an extinguishment of liability, and does not apply to the remedy only. *Engel* v. *Davenport*, 271 U. S. 33. This would seem to make the time element just as important, in a consideration of liability, as a judgment or settlement.

Under a statute of Indiana it was provided "the action must be brought within two years." In *Louisville & St. Louis Railroad* v. *Clarke*, 152 U. S. 230, it was held that the statute gave the personal representative two years in which to sue, that he could not sue until the cause of action accrued, and that the cause of action did not accrue until the person injured died. The accident occurred November 25th, 1886, the death February 23rd, 1888. Action was brought April 28th, 1888. The action of the injured person was not barred, the old rule of a year and a day not applying.

Again we come across broad language:

> "The right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by

> the wrongful act or omission of another, depends upon the existence or non-existence of a right in the decedent, immediately before his death, to have maintained an action on account of such act or omission." (p. 238).

In discussing the nature of the liability we have mentioned the differences in the measure of damages, the creation of a new and distinct right of action for the benefit of the named dependent relatives. *Am. R. R. of Porto Rico v. Didricksen*,, 227 U. S. 145, at page 149. Furthermore, the two years do not begin to run until the date of death which is the date of accrual of the cause of action. *Reading Co.* v. *Koons*, 271 U. S. 58. But the real and only question is whether any right to bring an action existed in the personal representative when it did not exist in the deceased. To approach the problem from this correct angle makes unnecessary a discussion of Point A of petitioner's brief in support of the petition (pp. 14-16), and of Point C (pp. 18-21).

If there is no omission of duty to the decedent, can it be said that there is any duty owing to the designated beneficiaries? Can the personal representative, on behalf of the designated beneficiaries, recover even though the deceased could not have recovered damages had he not been killed? "The company is not under two different measures of obligation— . . ." *Northern Pacific Railway Co.* v. *Adams, supra,* at page 450.

"I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation." *British Columbia E. Ry.* v. *Turner*, 49 Can. S. C. R. 470, 496. (Quoted with approval in *British Electric Railway Company Limited* v. *Gentile*, [1914] A. C. 1034, at p. 1042).

Loss of a right by mere failure to act within a certain time is illustrated by *C., B. & Q. R. R.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161. It will be recalled that one Anderson was killed instantly. His mother survived but died without any action having been brought on her behalf, and the administrator sued for the benefit of a sister. It was held that the sister was not entitled to compensation.

Chief Justice Wheeler, writing the opinion of the Supreme Court in our case, said:

> "We discover no distinction between a judgment, or a settlement obtained by the decedent, and the lapse of the statutory period, in barring the maintenance of an action under this Act." (R. 14).

Without citation of authority we can say that except for the statute there would be no liability in the event of death. It is the obvious intent of the statute to provide that the death of the party injured shall not free the wrong-doer. But this is the only defense of which the statute intended to deprive the wrong-doer (see opinion of Judge Rapallo in *Littlewood* v. *Mayor*, 89 N. Y. 24, construing the New York Laws of 1847, c. 450, §§1, 2, and considering it to be substantially like Lord Campbell's Act, 9 and 10 Victoria, c. 93). This singleness of purpose appears in the Federal Employers' Liability Act itself, "in case of the death of such employee."

Also as a matter of statutory construction we say that attached to the right of action by the personal representative there is the implied statutory condition that, at the time of the death, the employee had a right of action that could be enforced. This is the method of approach of *Williams* v. *Alabama Great Southern Ry. Co.*, 158 Ala. 396, construing another act. Again, it would involve forced construction, in the absence of express

language, to hold that the Act intended to create a liability to the dependents when there was none to the deceased at the time of his death. See *Green* v. *British Columbia Electric Ry. Co.*, 12 British Columbia Reports, 199.

The Act indicates an intent to name a definite period of limitation. It does not indicate an intent to name the date of death as the beginning of the period if there has been a bar by lapse of time, and not any date if there has been a release with payment or a satisfied judgment or a contract.

As direct authority for our general position we refer to *Rodgers v. Pennsylvania R. Co.*, 19 Fed. (2d) 522 (Dist. Ct., E. D. New York, 1927). Deceased, injured November 10, 1922, died February 4, 1925, more than two years later. On December 2, 1926, the administratrix sued under the Federal Employers' Liability Act for conscious pain and suffering of the deceased, and for pecuniary loss suffered by reason of the death. District Judge Moscowitz held that plaintiff could not recover on either cause of action because nothing survived to the representative for the conscious pain and suffering and because deceased could not have maintained an action immediately before his death, relying upon the language of *Mich. Cent. R. R.* v. *Vreeland*, *supra*, particularly pages 68 and 69.

A summary statement of respondent's position is found in Roberts', Federal Liabilities of Carriers, Second Edition, Sections 900 and 957.

Section 900.

"EXTINCTION OF EMPLOYEE'S RIGHT OF ACTION BARS SUIT IN BEHALF OF BENEFICIARIES. But while the two rights of action created by section 1 of the act are entirely distinct to the extent that one is for the wrong to the injured person and is con-

fined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death, yet they originate in a single wrongful act. And as the foundation of the right of action for death is the original wrongful injury to the decedent, so it has been generally held that the action for death is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.

"For these reasons it is held that if the right of action of the injured employee is extinguished during his lifetime, either by failure to bring suit within the statutory period, by recovery and enforcement of judgment, or by compromise thereof with the negligent employer, his beneficiaries will have no right of action for his death. And manifestly such a termination of the employee's right of action, in his lifetime, will preclude the survival of any right of action to the personal representative for the employee's loss and suffering."

Section 957.

"WHERE EMPLOYEE DIES FROM INJURY AFTER HIS RIGHT TO SUE HAS LAPSED. In this connection it may be well to point out that where an employee, injured under circumstances giving rise to a cause of action in his favor under the liability act, survives his injury by more than two years and then dies, as a result of such injury, without having brought suit or receiving satisfaction therefor, his personal representative will have no cause of action for the death, although he brings suit within two years after the death. This result however, is not due to the fact that the suit was not brought within two years after the cause of action for death accrued, because no such cause of action could accrue until

death occurred. It results, on the contrary, from the fact that in the circumstances of the case no cause of action for death could ever accrue, because prior to the possible occurrence of the conditions fixing the carrier's liability for death, the right of action for injury had ceased to exist."

Petitioner claims no right of action for conscious pain and suffering. By failure to sue within two years from the date of injury deceased's right was barred and there could be no survivorship. The petitioner cannot have a single recovery for a double wrong as plaintiff had in *St. Louis, Iron Mountain & Southern Railway Co. v. Craft*, 237 U. S. 648. If allowed a single recovery for a single wrong the resulting situation would be anomalous, offending a uniformity principle mentioned in *Reading Co. v. Koons, supra*, at pages 63 and 64. This anomalous situation is recognized by Chief Justice White in his opinion (R. 14).

Point B of petitioner's brief (pp. 16-18) argues that the Federal Employers' Liability Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he died. A reading of the Act leads to this obvious conclusion.

Petitioner seems to have in the background the thought that because there is but one recovery, there must necessarily, always, be a recovery.

Petitioner's statement of a great distinction between affirmative extinguishment and extinguishment by lapse of time goes no deeper than the assertion, although he purports to find encouragement in *Southward Air Line Ry. Co. v. Oliver, supra*. We have already discussed this case (respondent's brief, p. 6).

Chief Justice Wheeler recognized a conflicting statement (R. 13). The opinion attempts a distinction between the Federal Employers' Liability Act and Lord Campbell's Act whereas both *Mich. Cent. R. R.* v. *Vreeland*, *supra*, and *Mellon* v. *Goodyear*, *supra*, treat the two as of like nature, ~~essentially~~ identical, at least "insofar as it gives an action for the benefit of dependents." (p. 345 of latter case). Furthermore, the Oliver case was referred to in discussing section 9 as amended in 1910 (Act of April 5, 1910, c. 143, §2, 36 Stat. 291), not section 1 of the 1908 Act (p. 343).

(c) *The same conclusion has been reached under similar statutes.*

According to Tiffany, Death by Wrongful Act, 2nd ed., §23, Lord Campbell's Act creates a new cause of action, as do the statutes of many of the States.

In *Williams* v. *Mersey Docks & Harbour Board*, [1905] 1 K. B. 804, the injury occurred in December, 1902, the death in December, 1904, and action was started in February, 1905. The Public Authorities Protection Act, 1893, §1 (a), provided for action by the injured within six months after the neglect. The action was brought under Lord Campbell's Act. It was held that the representative could not maintain this action unless the deceased could, although as interpreted, the Act gives a totally new action, new in its species, in its qualities, in its principles (see Appendix A, p. 12).

In *British Electric Railway Company Limited* v. *Gentile*, *supra*, we find this language:

> "Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not

taken place. At that moment, however, the test is absolute." (p. 1041).

Petitioner says (brief, pp. 20 and 21) the case of *Robinson* v. *Canadian Pacific Railway Co.*, [1892] A. C. 481, involved a statute similar to the Federal Employers' Liability Act and presented the exact question. It was pointed out in the opinion that the terms of §1056 of the Civil Code of Lower Canada, under which the action was brought, differed substantially from those of Lord Campbell's Act.

In *Kelliher* v. *N. Y. C. & H. R. R. R. Co.*, 212 N. Y. 207, plaintiff's interstate was injured in November, 1906, and died in February, 1912. Within a few months the administratrix brought an action. The Court of Appeals held that where an action could not have been brought by the decedent because not brought within three years after accrual, it could not be maintained for the same accident by his representative. In Appendix B we have printed the pertinent parts of the statute, Code of Civil Procedure, §1902; L. 1847, c. 450, §§1, 2; L. 1849, c. 256; L. 1870, c. 78; L. 1909, c. 221; L. 1915, c. 620.

For Alabama we refer to two cases. In *Williams* v. *Alabama Great Southern Railway Co.*, *supra*, the injury occurred July 15, 1901, intestate died September 1, 1903, the action was begun October 4, 1904. Williams did not sue for his personal injuries. Suit was brought under Section 1751 of the Code of 1896 reading as follows:

> "Personal Representative may Sue, if Injury Results in Death.—If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions."

The court said:

> "'But the measure of the administrator's right to have the employer declared responsible towards him is to be ascertained by the rights the deceased himself had against the employer.' And it seems to us the correct construction of the statute to say that there is attached to the administrator's right of action the implied statutory condition that, at the time of the employe's death, he had a right of action which could be enforced. If his right was then gone, or if his right was then barred, the administrator has no claim. 'The statute extends the remedy to the administrator, but does not revive the defendant's liability if it had been extinguished. It simply gives him the right to avail himself of the right of action the deceased had at his death', and it is given for the same wrongful act or neglect. That is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases." (pp. 400, 401).

In *Seaboard Air Line Ry.* v. *Allen*, 192 Fed. 480 (Circ. Ct. of Ap., 2nd: Circ., petition for writ of certiorari denied, 226 U. S. 612), Scott, employee of defendant, was injured November 17, 1904, died August 11, 1908. The action was begun July 29, 1910, under section 2486 of the Civil Code of Alabama (vol. 2 of 1907) reading in part as follows:

> "A personal representative may maintain an action and recover such damages as the jury may assess, for the wrongful act, . . . of any . . . corporation, . . . whereby the death of his . . . intestate was caused, if the . . . intestate could have maintained an action for such wrongful act, . . . if it had not caused death; . . . Such action must be brought within two years from and after the death of the . . . intestate."

It was contended that the action could not be maintained because Scott had not brought an action within the prescribed one year period.

Circuit Judge Lacombe put this question:

> "Is this ability to maintain an action to be considered, as the words would seem to indicate, as an ability so to do at the time when the statutory cause of action arises, viz., at the moment of death?" (p. 481).

The opinion argues that if the court considers only the original negligence and the subsequent death then recovery of judgment or settlement would be no defense. Yet it is generally agreed that both judgment and settlement are defenses even though they are not payments for the same thing. It was held that because deceased did not have a right of action at the moment of death the personal representative could not maintain the action.

Because of its marked difference the interpretation of the Pennsylvania statute is illuminating. *Western Union Telegraph Co. v. Preston*, 253 Fed. 229 (Circ. Ct. of Appeals, 3rd. Circ.; certiorari denied in 248 U. S. 585; same case in 246 Fed. 543, 250 Fed. 189) was decided on the express language creating a liability to the beneficiaries when there was none to the deceased at the time of death because the personal injury suit had not been brought within two years as provided by Act of June 24, 1895, P. L. 236, section 2.

Preston, injured in September, 1905, died in October, 1915. He brought no suit during his life but his widow brought an action, within one year after his death, under the statutes of Pennsylvania. These read:

> "Whenever death shall be occasioned by unlawful violence or negligence, *and no suit for damages be brought by the party injured during his or her life*, the widow of any such deceased, or if there be no widow, the personal representative may maintain an action for

and recover damages *for the death* thus occasioned." Act of April 15, 1851 (P. L. 669) §19 (italics ours).

"The declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death, and not thereafter." Act of April 25, 1855 (P. L. 309).

The opinion refers to Lord Campbell's Act and similar American statutes as giving a new right of action, founded on a new grievance. The cause of action is the tort which produced the death. The right depends primarily on the liability of the wrong doer to the employee. Liability may be destroyed by the act of the deceased—assumption of risk, contributory negligence, release, etc. The opinion says, referring to its own case, that the husband had simply permitted a statute of limitations to deprive him of his right to sue upon it and the tort that occasioned the death still existed. Thus a further ground of distinction from the instant case is suggested, since the limitation period prescribed in the Federal Employers' Liability Act operates to extinguish the tort and cause of action and does not merely bar the right to sue upon it.

We have discussed the Indiana statute under Point I, (b), pages 7 and 8. If there had been a limitation on the time to sue for personal injuries in *Louisville & St. Louis Railroad* v. *Clarke, supra*, we would have the problem presented in the case at bar.

POINT II.

The interpretation adopted is fair to all parties.

"This is not an unjust result . . . It is fair that their claim, although different in nature and principle should be dependent on the existence of a right in the injured person at the time he died . . . All this is fair and just, even liberal.

But to go on and say that a man could be injured and make no claim and when he died forty years later allow his family to assert that his death resulted from the injury and that they should be compensated would do violence to the purposes of the statute of limitations."

Memorandum of decision on demurrer, Judge Ells, R. 6.

"Ill consequences to both employees and employers" would follow the adoption of a contrary view (*Mellon* v. *Goodyear*, *supra*, at page 345). This interpretation carries out the general purposes of the statute, with fair, practical results, without resort to technical distinctions.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

Edward R. Brumley

Counsel for The New York, New Haven and Hartford Railroad Company.

FLEMING JAMES, JR.,
Of Counsel.

APPENDIX A

Lord Campbell's Act, 9 and 10 Victoria, c. 93.

Section 1. Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Section 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, . . . shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

Section 3. Provided always, that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

APPENDIX B

New York Code of Civil Procedure, §1902.

L. 1847, c. 450, §§1, 2 as amended (in part).

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent, who has left, him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death.

SUPREME COURT OF THE UNITED STATES.

No. 235.—October Term, 1930.

Edward F. Flynn, Executor of Edward L. Flynn, Petitioner,
vs.
The New York, New Haven and Hartford Railroad Company.

On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

[March 23, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit under the Employers' Liability Act for negligently causing the death of Edward L. Flynn, brought on May 15, 1929, by Flynn's executor for the benefit of Flynn's dependent widow and children. It is alleged that the injury was suffered on December 4, 1923, and that it caused Flynn's death on September 1, 1928. The defendant, respondent here, demurred to the declaration on the ground that more than two years having elapsed since the date when Flynn's cause of action accrued his right to sue was barred, and that therefore the suit could not be maintained. Act of April 22, 1908, c. 149, §§ 1, 6, 35 Stat. 65, 66. Act of April 5, 1910, c. 143, § 1, 36 Stat. 291. Code, Tit. 45, §§ 51, 56. The demurrer and judgment for the defendant were sustained by the Supreme Court of Connecticut. 111 Conn. 196. A writ of certiorari was granted by this Court. — U. S. —.

The Act of 1908 gives a right of action to the employee or, in case of his death, to his personal representative for the benefit of the widow and children and provides that no action shall be maintained 'unless commenced within two years from the day the cause of action accrued'. § 6. Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly repre-

sentative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 70. On this ground an effective release by the employee makes it impossible for his administrator to recover. *Mellon* v. *Goodyear*, 277 U. S. 335, 344. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel* v. *Davenport*, 271 U. S. 33, 38, and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this Court.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.